Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

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CHESTER BROST,
Petitioner,

vs.

KENNETH R. BRILEY,
Respondent.

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Petition for Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. ON THE QUESTION OF TIMELINESS OF THE HABEAS PETITION UNDER 28 U.S.C. § 2244(d), SHOULD CERTIORARI BE ALLOWED SO THIS COURT MAY CONSIDER AND RESOLVE SOME PERPLEXING, RECURRING AND CONTINUING PROBLEMS FACING THE FEDERAL JUDICIARY -- EVIDENT FROM CONFLICTING AND CONFUSING FEDERAL DECISIONS WITH RESPECT TO WHETHER A STATE COLLATERAL ATTACK [such as an Illinois post-conviction petition] IS "PROPERLY FILED" FOR PURPOSES OF TOLLING THE FEDERAL HABEAS LIMITATION PROVISION, EVEN IF THE STATE COURT EVENTUALLY DETERMINES IT WAS UNTIMELY FILED, WHERE STATE PROCEDURE ALLOWS AN EXCEPTION TO THE STATE PC TIMELINESS REQUIREMENT [such as lack of culpable negligence] AND THE PETITIONER CLAIMS TO COME WITHIN SUCH EXCEPTION?

2. SHOULD CERTIFICATE OF APPEALABILITY HAVE ISSUED, IN THAT CONFLICTING FEDERAL DECISIONS ON THE TIMELINESS ISSUE (see Question 1) DEMONSTRATE THAT REASONABLE JURISTS COULD DISAGREE AS TO TIMELINESS?

3. SHOULD A STATE COURT DETERMINATION THAT A POST-CONVICTION PETITION IS UNTIMELY-FILED, BE INFLEXIBLY BINDING ON A FEDERAL COURT, WHERE, AS

HERE, PETITIONER CLAIMS THAT THE STATE COURT DETERMINATION VIOLATES DUE PROCESS UNDER THE 14th AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IT WAS ARBITRARY AND CAPRICIOUS AS WELL AS IN CONTRAVENTION OF SETTLED STATE LAW?

4. DO PRINCIPLES OF STATUTORY CONSTRUCTION AND JUDICIAL ECONOMY MILITATE AGAINST THE DISTRICT COURT'S HOLDING THAT THE HABEAS HERE WAS UNTIMELY?

5. IN ANY EVENT -- SHOULD THE DISTRICT COURT HAVE APPLIED THE DOCTRINE OF "EQUITABLE TOLLING" OF THE FEDERAL HABEAS LIMITATION PERIOD?

## PARTIES INVOLVED

In the appeal proceedings from the United States Court of Appeals for the Seventh Circuit's denial of petitioner's certificate of appealability:

Petitioner, Chester Brost, was the Appellant in the United States Court of Appeals for the Seventh Circuit.

Respondent, Kenneth Briley, Warden of Stateville Correctional Center, was the Appellee in the United States Court of Appeals for the Seventh Circuit.

* * *

Petitioner Charles Brost was the petitioner in the denial of his petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division.

Respondent Kenneth Briley, Warden of Stateville Correctional Center, was the Respondent relative to petitioner's writ of habeas corpus, denied in the United States District Court for the Northern District of Illinois, Eastern Division.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioner, Chester Brost, prays that a writ of certiorari issue:

to the United States Court of Appeals for the Seventh Circuit, to review its denial of petitioner's certificate of appealability, and;

to the United States District Court for the Northern District of Illinois, to review its denial of petitioner's writ of habeas corpus.

## Opinions and Orders Below

All of the following judgments and orders are unreported [unpublished], and all are contained in the Separate Volume Appendix to this Petition.

The Order of the United States Court of Appeals for the Seventh Circuit, No. 01-C-2673, April 29, 2002, denying request for a certificate of appealability, is set out at App. A, pp. App. 1-2.

The Memorandum Opinion And Order of the United States District Court For The Northern District of Illinois, Eastern Division, No. 01 C 2673, May 18,

2001, dismissing petitioner's petition for writ of habeas corpus, is set out at App. B, pp. App. 3-12.

The Order of the United States District Court For The Northern District of Illinois, Eastern Division, No. 01 C 2673, February 11, 2002, denying petitioner's motion to reconsider, or in the alternative, for a certificate of appealability, is set out at App. C, pp. App. 13-17.

The Order of the Appellate Court of Illinois, First District, No. 1-95-0576, March 1, 1996, affirming petitioner's conviction and sentence, is set out at App. D, pp. App. 18-22.

The Order of the Circuit Court of Cook County, Illinois, No. 93 CR 12680, January 8, 1997, denying petitioner's pro se "motion to toll post-conviction limitation statute and for appointment of counsel," is set out at App. E, pp. App. 23-25

The Order of the Circuit Court of Cook County, Illinois, No. 93 CR 12680, April 23, 1997, dismissing petitioner's pro se petition for post-conviction relief, is set out at App. F, pp. App. 26-30.

The Order of the Circuit Court of Cook County, Illinois, No. 93 CR 12680, June 11, 1997, denying petitioner's pro se motion for reconsideration, is set out at App. G, pp. App. 30-31.

The Order of Appellate Court of Illinois, First District, Fourth Division, People v. Brost, Nos. 1-97-0733 and 1-97-2737 consolidated, entered March 4, 1999, granting leave for new counsel to substitute as counsel on appeal, and to file Supplemental Brief within 35 days, is set out at App. H, pp. App. 32-33.

The judgment (Order) of the Appellate Court of Illinois, First Judicial District, Nos. 1-97-0733 and 1-97-2737 consolidated, affirming summary dismissal of petitioner's post-conviction petition, entered March 31, 1999, is set out at App. I, pp. App. 34-38.

The Orders of the Illinois Appellate Court, First Judicial District, Nos. 1-97-0733 and 1-97-2737 consolidated, denying leave to file his Supplemental Brief instanter (App. J, pp. App. 39-40) and to enlarge the record, (App. K, pp. App. 41-43), both entered April 22, 1999, are set out in the separate volume Appendix.

The Order of the Illinois Appellate Court, First Judicial District, Nos. 1-97-0733 and 1-97-2737 consolidated, entered May 6, 1999, on reconsideration, denying motions for leave to file supplemental brief and to enlarge the record, is set out at App. L, pp. App. 43-44.

The Order of the Appellate Court in the above cause, entered Aug. 5, 1999, denying motion of new counsel requesting leave of court to file a

supplemental brief on behalf of Appellant, where the ineffective assistance of former counsel caused same to be presented out-of-time, is set out at App. M, pp. App. 45-46.

The Orders of the Supreme Court of Illinois, in Chester Brost, movant v. Justices of the First District Appellate Court, Fourth Division, et al., respondents, No. 87561 (entered June 18, 1999) and No. 88191 (entered Sept. 21, 1999), respectively denying petitioner's motion and second motion for supervisory order, etc., are set out at App. N, pp. App. 47-48, and App. O, pp. App. 49-50.

The Order of the Supreme Court of Illinois, No. 88351, entered Dec. 1, 1999, denying leave to appeal, is set out at App. P, p. App. 51.

The Order of Supreme Court of The United States, No. 99-1469, April 17, 2000, denying petitioner's petition for a writ of certiorari, is set out at App. Q, p. App. 52.

## Jurisdictional Statement

The order sought to be reviewed was entered by the United States Court of Appeals for the Seventh Circuit on April 29, 2002. (App. A, pp. App. 1-3)

The Order also sought to be reviewed was entered by the United States District Court for the

Northern District of Illinois, Eastern Division on May 18, 2001. (App. B, pp. 3-12)

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

## Constitutional Provision Involved

The federal constitutional provision involved is the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

## STATEMENT OF THE CASE

### Statement of Facts

Petitioner (then, defendant) was convicted in the Circuit Court of Cook County by a jury, of aggravated criminal sexual assault, and aggravated kidnapping, and was sentenced to 105 years in prison. (C 12-13) Defendant had private counsel at trial, but appointed counsel on appeal. (C 71)

Appointed counsel raised only one issue on direct appeal, that defendant did not waive his right to be present for sentencing. (C 71)

The conviction and sentence were affirmed in an unpublished Order [People v. Brost, No. 1-95-0576 (1996)], and defendant's pro se petition for leave to appeal to the Illinois Supreme Court was thereafter

denied. (C 70-71)

Within the applicable State limitations period, petitioner filed in the Circuit Court, a "Motion to Toll Post-Conviction Statute and For Appointment of Counsel." (C 2) The motion asserted that he was indigent, that Stateville penitentiary was on 24-hour lockdown which prevented him access to a law library and inmate or other legal assistance, and that his legal papers had been taken from him during a prison "shakedown." (C 2) This motion was denied, without appointment of counsel. (C 2) (App. E, p. App. 23)

Defendant thereafter filed a pro se post-conviction [PC] petition, which was summarily denied as having been untimely-filed. (C 168) (App. F, p. App. 26) Defendant's petition made numerous allegations of ineffective assistance of trial and appellate counsel, and prosecutorial misconduct. (C 12-43)

Counsel was appointed to appeal the dismissal of the pro se petition, but appointed counsel filed an inadequate and incompetent Brief in the Appellate Court of Illinois, First Judicial District.

Prior to any decision being rendered by that Appellate Court, however, petitioner's family retained private counsel who, on March 4, 1999, was granted leave to substitute as appellate counsel, and to and including March 30, 1999, within which to file a

Supplemental Brief. (App. H, p. App. 32)

Thereafter, the Appellate Court denied the instanter filing of the Supplemental Brief, which raised three valid (viable) issues unraised by appointed counsel, as it was submitted four (4) days past its first due date. (App. J, p. App. 39)

The Appellate Court also denied at the same time, a Motion to Enlarge the Record, with evidence [official records of the Illinois Attorney Registration and Disciplinary Commission] that defendant's trial counsel was suspended from the practice of law for malfeasance about the time of defendant's trial. (App. K, p. App. 41)

Motion For Reconsideration was denied, as to both the above Orders. (App. L, p. App. 43)

A Motion for reconsideration filed by new and separate counsel, alleging ineffectiveness in the 4-day-late Supplemental Brief submission was denied. (App. M, p. App. 45)

The Supreme Court of Illinois denied two successive motions for supervisory Orders (Apps. N & O, pp. App. 47-50), and denied leave to appeal. (App. P, p. App. 51)

The dismissal of the pro se PC petition as untimely-filed was affirmed by the Appellate Court on

March 31, 1999. (App. I, p. App. 34)

The Illinois Supreme Court denied leave to appeal on December 1, 1999. (App. P, p. App. 51)

The United States Supreme Court denied petitioner's writ of certiorari thereafter, on April 17, 2000. (App. Q, p. App. 52)

Subsequently, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The United States District Court for the Northern District of Illinois, Eastern Division, dismissed same, concluding that the State court determination that petitioner's post-conviction petition was untimely-filed was binding on the District Court. (App. B, at App. 7-8) The District Court further held that the petition for writ of habeas corpus was untimely filed. (App. B, at App. 8-10) Petitioner's motion for reconsideration was thereafter denied. (App. C, pp. App. 13-17) The United States Court of Appeals for the Seventh Circuit thereafter denied petitioner's request for a certificate of appealability. (App. A, pp. App. 1-2)

## RAISING THE FEDERAL QUESTION

The federal question was raised throughout these proceedings, inasmuch as the Fourteenth Amendment entitles a prison inmate meaningful access to the courts, and that right has been violated throughout these proceedings, as noted in the Statement of Facts, set out above.

## REASONS FOR GRANTING CERTIORARI

1. ON THE QUESTION OF TIMELINESS OF THE HABEAS PETITION UNDER 28 U.S.C. § 2244(d), CERTIORARI SHOULD BE ALLOWED SO THIS COURT MAY CONSIDER AND RESOLVE SOME PERPLEXING, RECURRING AND CONTINUING PROBLEMS FACING THE FEDERAL JUDICIARY -- AS IS EVIDENT FROM CONFLICTING FEDERAL DECISIONS WITH RESPECT TO WHETHER A STATE COLLATERAL ATTACK [such as an Illinois post-conviction petition] IS "PROPERLY FILED" FOR PURPOSES OF TOLLING THE FEDERAL HABEAS LIMITATION PROVISION, EVEN IF THE STATE COURT EVENTUALLY DETERMINES IT WAS UNTIMELY FILED, WHERE STATE PROCEDURE ALLOWS AN EXCEPTION TO THE STATE PC FILING LIMITATION [such as lack of culpable negligence] AND THE PETITIONER CLAIMS TO COME WITHIN SUCH EXCEPTION.

The District Court's decision (Apps. B & C), to which the 7th Circuit (in effect) adhered when it refused to grant certificate of appealability (App. A), is founded on an interpretation of the AEDPA's habeas limitations provision, 28 U.S.C. § 2244(d), which is contrary to another decision of the 7th Circuit, contrary to decisions of other federal Courts of Appeal, and also contrary (in principle) to a most recent decision of this Court, Carey v. Saffold, No. 01-301, ___ U.S. ___, 71 CrL 354, decided June 17, 2002.

At issue is whether defendant's state (Illinois) collateral attack (post-conviction petition) was "properly filed" for purposes of tolling the one-year limitations provision of the AEDPA, 28 U.S.C. § 2244(d),[1] even though it was ultimately held untimely by the Illinois courts (Apps. F, I, P), where under Illinois law, a late petition may still be considered if defendant shows a lack of culpable negligence, and here, defendant claimed lack of culpable negligence.

The interpretation and application of the District Court here (App. B, at App. 7-9) conflicts with another recent 7th Circuit decision on the topic, Rice v. Bowen, No. 00-4034, 2001 U.S. App. LEXIS 14842, decided June 27, 2001. In reversing the District Court's timeliness dismissal of Rice's habeas petition, the 7th Circuit held that Rice's habeas was not time-barred, and stated:

> "Other circuits have also held that if a state's rule governing the timely commencement of post-conviction proceedings contains exceptions requiring courts to examine the merits of the petition before dismissing it, THE PETITION, EVEN IF

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[1] AEDPA provides that the limitation period is tolled while "a properly filed application for State post-conviction or other collateral review . . . is pending." 28 U.S.C. § 2244(d)(2).

> ULTIMATELY HELD TO BE TIME-BARRED, SHOULD BE REGARDED [for habeas limitations purposes under 28 U.S.C. § 2244(d)] AS PROPERLY FILED. [*9] See *Dictado v. Ducharme*, 244 F.3d 724, 727-28 (9th Cir. 2001); *Emerson v. Johnson*, 243 F.3d 931, 935 (5th Cir. 2001)[;] *Smith v. Ward*, 209 F.3d 383, 385 (5th Cir. 2000). Illinois provides a statutory exception to its post-conviction time limitation if 'the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.' 725 ILCS 5/122-1)c. . . . [T]he state courts had to consider the merits of Rice's petition before determining whether it was timely." Id. at *8-*9. (Emphases added.)

The 5th and 9th Circuit decisions cited and relied on by the 7th Circuit in Rice v. Bowen, supra -- Dictado v. Ducharme, 244 F.3d 724, 727-28 (9th Cir. 2001); Emerson v. Johnson, 243 F.3d 931, 935 (5th Cir. 2001); Smith v. Ward, 209 F.3d 383, 385 (5th Cir. 2000) -- thus also conflict with the District Court here. (App. B, at App. 7-9)

The instant decision is also contrary (in principle) to a most recent decision of this Court, Carey v. Saffold, No. 01-301, ___ U.S. ___, 71 CrL 354, decided June 17, 2002, wherein this Court held that under California's statutory collateral atttack provisions, which utilize a "reasonableness" standard

rather than a specific deadline, an application for state collateral review remains "pending" -- and thus tolls the statute of limitations applicable to a federal habeas corpus petition brought by a state prisoner, during periods between a state court's decision on the prisoner's application for collateral review and the filing of a notice of appeal to a higher state court, and this rule applies to California's post-conviction relief system.

Another decision arising within the 7th Circuit that demonstrates the conflicts and confusion surrounding the issue at hand, is Wilson v. Battles, No. 01-4336 (pending decision after oral argument in the 7th Circuit), where the District Court (N.D. Ill., E.D., No. 00 CV 7969) (Dec. 10, 2001), dismissed the habeas petition as untimely (after originally ruling that equitable tolling saved the habeas).

These conflicts and confusion within the federal judiciary with regard to this important issue, warrant the grant of certiorari to resolve the matter.

2. CERTIFICATE OF APPEALABILITY SHOULD HAVE ISSUED, IN THAT CONFLICTING FEDERAL DECISIONS ON THE TIMELINESS ISSUE (see Question 1) DEMONSTRATE THAT REASONABLE JURISTS COULD DISAGREE AS TO TIMELINESS.

Certificate of appealability should issue where reasonable jurists could differ as to the procedural (here, timeliness) ruling. Slack v. McDaniel, 529 U.S. 473, 146 L.Ed.2d 542 (2000).

Here, the conflicts and confusion pointed out in Point 1, supra, demonstrate that reasonable jurists do indeed differ as to whether a state post-conviction petition is "pending" for federal habeas limitation tolling purposes in circumstances similar to at bar.

3. A STATE COURT DETERMINATION THAT A POST-CONVICTION PETITION IS UNTIMELY-FILED, SHOULD NOT BE INFLEXIBLY BINDING ON A FEDERAL HABEAS COURT FOR PURPOSES OF COMPUTING WHETHER A FEDERAL HABEAS PETITION IS TIMELY, WHERE, AS HERE, THE STATE COURT DETERMINATION VIOLATES DUE PROCESS UNDER THE 14th AMENDMENT TO THE U.S. CONSTITUTION BECAUSE IT WAS ARBITRARY AND CAPRICIOUS AS WELL AS IN CONTRAVENTION OF SETTLED STATE LAW.

The District Court cited Fernandez v. Sternes,

227 F.3d 977, 978 (7 Cir. 2000), for the proposition that "however mistaken or unfair it may" be, if a state court rejects a post-conviction petition as procedurally irregular, that determination is "binding" on the federal courts. (App. B, at App. 7)

Such a rigid standard is in conflict with the decision in Marino v. Ragen, 322 U.S. 561, 92 L.Ed. 170 (1947), and the Fourteenth Amendment, where -- as here -- the state court determination violates due process under the 14th Amendment to the U.S. Constitution, because it was arbitrary and capricious as well as in contravention of settled Illinois law.

Illinois law is clear that a trial court upon receiving a "pro se petition, however labeled, and however inartfully drawn, alleg[ing] violations of the petitioner's constitutional rights in a post-conviction proceeding, [s]hould thereafter, for all such purposes, treat it as such." People ex rel. Palmer v. Twomey, 53 Ill.2d 479, 292 N.E.2d 379, 382 (1973).

Had the state court(s) followed Illinois law, petitioner's initial *pro se* submissions should have been treated as a post-conviction petition, and petitioner would not have been barred access to the courts on timeliness grounds. (See Statement of Facts, above.)

The "federal courts should be open to a petitioner," "whenever it may become clear that the alleged state remedy is nothing but a procedural

morass offering no substantial hope of relief." Marino v. Ragen, supra, 92 L.Ed.2d at 173, 175.

A prison inmate is entitled to meaningful access to the courts under the Due Process Clause of the Fourteenth Amendment. Bounds v. Smith, 430 U.S. 817, 52 L.Ed.2d 72, 80 (1977).

A State court determination that a post-conviction petition is untimely-filed, should not be inflexibly binding on a federal court, where as here, the State court determination was so arbitrary and capricious that it violates due process. Certiorari should be allowed so that this court may discourage habeas courts from failing to consider whether a State decision they are supposed to follow, was entered in violation of federal due process.

4. PRINCIPLES OF STATUTORY CONSTRUCTION AND JUDICIAL ECONOMY MILITATE AGAINST THE DISTRICT COURT'S HOLDING THAT THE HABEAS WAS UNTIMELY.

The District Court ultimately concluded that "even if Brost's post-conviction petition *had* tolled the limitations period, his habeas petition would be untimely," (App. B, at App. 8) (emphasis in original), because petitioner's petition for writ of certiorari filed in this Court (to the Illinois Supreme Court) did not toll the limitations period, as a pending certiorari

petition is "not a form of 'State . . . review.'" (App. B, at App. 8-9, fn. 4; see pp. App. 8-9.)

The origin of this legal reasoning, in all of the decisions in this context, arises from the stated conclusion that the word "State" modifies both the phrase "post-conviction review" and the phrase "other collateral review," in 28 U.S.C. § 2244(d)(2). See, e.g., Bunney v. Mitchell, 241 F.3d 1151, 1156 (9 Cir. 2001). See also, Order denying writ of habeas corpus, p. 4, fn. 4. (App. B, at App. 8-9, fn. 4)

This reasoning is flawed -- per principles of statutory construction, and per principles of judicial economy.

There is an entire body of settled law, relative to the use of the word "or" in a statute. United States v. Johnson, 791 F. Supp. 242, 244 (E.D. Mo. 1992).[2]

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[2] See also, e.g., GenCor Inc. v. American Intern. Underwriters, 178 F.3d 804, 821 (6 Cir. 1999) ("or" is a "disjunctive" term which provides alternatives); United States v. Smith, 35 F.3d 344, 346 (8 Cir. 1994) ("or" may not be construed to mean "and"); In re Pacific Rim Investments, LLP, 243 B.R. 768, 771 (D. Colo. 2000) (word "or" in Bankruptcy Code's stay provisions reflects that the statute creates independent alternative bases upon which a bankruptcy court may grant relief).

Bunney and similar decisions fly in the face of this settled principle of statutory construction.[3]

The reasoning of the Bunney Court and similar decisions in this context, necessarily means that the authors of 28 U.S.C. § 2244(d)(2), wrote this statute grammatically incorrectly, and that they do not know how to position modifiers correctly.

Ambiguity and the rule of lenity

The Supreme Court has a "long-established practice of resolving questions concerning the ambit of a criminal statute in favor of lenity." United States v. Smith, 35 F.3d 344, 346 (8 Cir. 1994).

The rule of lenity operates to resolve any ambiguity in the defendant's favor. United States v. Granderson, 511 U.S. 39, 127 L.Ed.2d 611, 627-28 (1994).

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[3] The holdings are flawed also, because this reasoning is contrary to basic rules of English language composition, grammar, and grammatical construction. See generally STILMAN, A., GRAMMATICALLY CORRECT: THE WRITER'S ESSENTIAL GUIDE TO PUNCTUATION, SPELLING, STYLE, USAGE AND GRAMMAR, PART FOUR: "Grammar, Positioning Modifiers Correctly," at 232-34 (Writer's Digest Books, Cincinnati, Ohio, 1997).

Judicial Economy and Efficiency

The holdings are also flawed because the reasoning conflicts with settled principles of judicial economy.

Although a petitioner need not file a petition for writ of certiorari from the denial of State post-conviction relief, before filing a federal petition for writ of habeas corpus -- a petitioner is not barred from doing so.

The Bunney reasoning, would require a petitioner, thus, in nearly every case where a petition for certiorari is filed, to, in essence, simultaneously seek relief in a federal district court, at the same time as seeking relief in the United States Supreme Court.

What if certiorari was granted, in this scenario? Should a district court be conducting litigation concerning constitutional claims, at the same time that the United States Supreme Court has taken the same issue or issues, for its resolution?

Rules of judicial economy should apply, if doing so will save considerable time and unnecessary expense in preparation for all parties in court. Keister v. Dow Chemical Co., 723 F.Supp. 117, 120 (E.D. Ark. 1989).

Judicial efficiency also relates to the efficiency

with which parties are able to resolve their differences. Twyman v. Wedlo, Inc., 204 B.R. 1006, 1008 (N.D. Ala. 1996).

The Bunney reasoning is flawed, and yet another calculated stratagem to block prisoners from access to the courts. No good will come in the end, from refusing to allow our bursting prison population the right to petition the Government for a redress of grievances.

5. IN ANY EVENT -- THE DISTRICT COURT SHOULD HAVE APPLIED THE DOCTRINE OF "EQUITABLE TOLLING" OF THE FEDERAL HABEAS LIMITATION PERIOD.

Defendant raised in the District Court -- which did not address the issue in its Orders (Apps. B & C) -- that even if the habeas petition (*arguendo*) were time-barred, the circumstances outlined in the pleadings (see Statement of Facts, above) warranted application of the doctrine of equitable tolling. The court should have considered this claim. See, e.g., Davis v. Johnson, 158 F.3d 806, 811 (5 Cir. 1998), citing and relying on Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 71 L.Ed.2d 234, 243 (1982); cf. United States v. Patterson, 211 F.3d 927 (5 Cir. 2000).

A well-pleaded claim of equitable tolling, as here, must not be rejected out-of-hand without

evidentiary hearing in a habeas proceeding. See Townsend v. Sain, 372 U.S. 293, 9 L.Ed.2d 770 (1963); Machibroda v. United States, 368 U.S. 487, 494-96, 7 L.Ed.2d 473, 478-79 (1962); Castillo v. United States, 34 F.3d 443 (7 Cir. 1994).

For this reason as well, certiorari should be allowed, to enable this Court to ensure that habeas forums consider claims of equitable tolling on the merits rather than simply ignoring the issue, as was done here.

## CONCLUSION

For any and/or all of the above reasons, certiorari should be allowed.

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Dated: July 24, 2002

Supreme Court, U.S.
FILED

No. 02-147 JUL 25 2002

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2001

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CHESTER BROST,
Petitioner,
vs.

KENNETH R. BRILEY,
Respondent.

---

Petition for Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

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# SEPARATE VOLUME APPENDIX
PURSUANT TO SUPREME COURT RULE 14.1.(i)
RELATIVE TO:
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 19, 2002
Decided April 29, 2002

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

No. 02-1550

CHESTER BROST,
*Petitioner-Appellant*,
v.
KENNETH BRILEY,
*Respondent-Appellee*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 01-C-2673

Charles R. Norgle, Sr.,
*Judge*

O R D E R

Chester Brost has filed a notice of appeal from the denial of his petition under 28 U.S.C. § 2254, which we construe as an application for a certificate of appealability. This court has reviewed the final order of the district court and the record on appeal. We find no substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c)(2).

Accordingly, the request for a certificate of appealability is DENIED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States ex rel.

CHESTER BROST
(B-62561)

Petitioner,

v.

KENNETH BRILEY,
Warden,

Respondent.[1]

No. 2001 C 2673

Judge Charles R. Norgle

[dated 5-18-01]

MEMORANDUM OPINION AND ORDER

Petitioner Chester Brost, represented by counsel, has filed this petition for writ of habeas

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[1] Although the petitioner also lists the Attorney General of Illinois as a respondent, as the petitioner is in custody the only proper respondent is the warden of the institution in which he is confined. The clerk is directed to dismiss the Attorney General as respondent.

corpus challenging his conviction by the Circuit Court of Cook County of robbery, aggravated kidnapping and three counts of aggravated criminal sexual assault, for which he was sentenced to a total of 105 years' imprisonment. For the following reasons, the court finds the petition barred by 28 U.S.C. § 2244(d). The court will therefore neither address the merits of the petition nor order a response.[2]

STATE COURT PROCEEDINGS

Brost was convicted on January 4, 1995. The Illinois Appellate Court affirmed Brost's convictions on March 1, 1996, and the Illinois Supreme Court denied leave to appeal on June 4, 1996. In 1996, the Illinois Post-Conviction Act set the limitation period for filing a post-conviction petition as follows: [p. 2]

> No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or

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[2] Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts requires the court to conduct an initial review of habeas corpus petitions. The Court may summarily dismiss a petition without examining the state court record or ordering a response if it plainly appears from the face of the petition and its exhibits that the petitioner is not entitled to relief. *Small v. Endicott*, 998 F.2d 411, 414 (7th Cir. 1993).

> more than 45 days after the defendant files his or her brief in the appeal of the sentence before the Illinois Supreme Court (or more than 45 days after the deadline for the filing of the defendant's brief with the Illinois Supreme Court if not brief is filed) or 3 years from the date of conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence.

725 ILCS 5/122-1(c). Unless he could show a lack of "culpable negligence," Brost had to file any post-conviction petition on or before December 4, 1996, six months after the Illinois Supreme Court denied leave to appeal.

On November 4, 1996 Brost mailed a document captioned "Motion To Toll Post-Conviction Limitation Statute And For Appointment Of Counsel." Exhs. at A-2-6.[3] The motion explained that Stateville had been "on lock-down status," making it nearly impossible for him to use the law library. He stated that he doubted that he could file a post-conviction petition on time, and asked that the time limit for filing a petition be tolled. He also asked that counsel be appointed to assist him. The motion, prepared with the assistance of another inmate, did not mention any claim Brost

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[3] Brost's counsel has furnished an idiosyncratically lettered and numbered appendix of exhibits, in which a letter may designate more than one document.

intended to raise.

On January 8, 1997, after the limitations period had run, Judge Thomas A. Hett of the Circuit Court of Cook County denied the motion to toll the limitations period, stating, "there is no statute that allows the Court -- to allow the Court to total [sic] requirements in this case." Exhs. at D-1-4. Nevertheless, on February 20, 1997, Brost filed a post-conviction petition with exhibits. Exhs. B-1-159. On April 23, 1997, Judge Hett denied the petition as untimely, finding that inmates at Stateville were given access to legal services and materials, and that Brost's late filing was not excused by a lack of culpable negligence. Exhs. E-1-5. Brost filed a motion for reconsideration, which Judge Hett denied without comment on June 11, 1997. Exhs. F-1-2. Brost filed a notice of appeal July 2, 1997. Exhs. C-24.

Counsel was appointed for Brost in the appeal of the denial of his post-conviction petition, but Brost asserts that his counsel's presentation was ineffective. Brost hired private counsel, but [p. 3] the Illinois Appellate Court denied his new attorney permission to file a supplemental brief six days past the due date. Brost's new counsel attacked the refusal as abusive, but the Appellate Court did not reconsider, nor did the Illinois Supreme Court grant a writ of mandamus compelling the Appellate Court to accept the late brief. Exhs. I, J, K, L. The Illinois Appellate Court rejected Brost's appeal, and the Illinois Supreme Court denied leave to appeal December 1, 1999, Exhs. N, and the United States Supreme Court denied certiorari April 17, 2000.

TIMELINESS

In 1996 Congress imposed a one-year limitation period for petitions for habeas corpus challenging state criminal convictions. The one-year period normally begins on "the date on which the judgment became final by the conclusion of direct review of the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). Here that date was September 3, 1996, when the 90-day period for seeking certiorari from the United States Supreme Court expired. The one-year limitations period is interrupted during the time "a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2). But "properly filed" is critical; a petition that is untimely under state law is not "properly filed" and does not stop the clock. *Artuz v. Bennett*, --- U.S. ----, 121 S.Ct. 361, 364 & n. 2, 148 L.Ed.2d 213 (Nov. 7, 2000); *Freeman v. Page*, 208 F.3d 572 (7th Cir. 2000).

The Circuit Court of Cook County denied Brost's post-conviction as untimely, and that holding was affirmed on appeal. However mistaken or unfair it may appear, that determination is binding on this court. The Seventh Circuit has held that "whether a petition is 'properly filed' depends on state law, so that if a state court accepts and entertains it on the merits it has been 'properly filed' but that if the state court rejects it as procedurally irregular it has not been 'properly filed.'" *Fernandez v. Sternes*, 227 F.3d 977, 978 (7th Cir. 2000) (citing *Freeman*).

The facts of *Freeman* closely resemble this case.

The plaintiff had filed his post-conviction petition late, but claimed this was not due to culpable negligence because Stateville Correctional Center "was on lock-down for a substantial period of time prior to and after July 1, 1995," the date [p. 4] a shortened limitations period for post-conviction relief went into effect. *Freeman*, 208 F.3d at 575. The Illinois courts found this excuse did not negate "culpable negligence," and the Court of Appeals held that this was a determination of state law binding on federal courts. *Id.* at 576. Since Brost's untimely post-conviction petition did not toll the running of the limitations period, it expired September 3, 1997, more than three years before this petition was filed.

Even if Brost's post-conviction petition *had* tolled the limitations period, his habeas petition would be untimely. Between September 3, 1996, when the period began to run, and February 20, 1997, when the petition was filed, 240 days elapsed. After the Illinois Supreme Court denied leave to appeal on December 1, 1999, the petition was no longer "pending" and the clock would have begun to run again, to run out on or about April 6, 2000.[4] And even if it were considered

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[4] The date is "on or about" because the court is uncertain whether a period of a year ending in a leap year should be counted as 365 or 366 days. The Seventh Circuit has not yet decided whether a pending petition for certiorari is "a properly filed application for State post-conviction or other collateral review" that tolls the limitations period. *Gutierrez v. Schomig*,

"pending" until the United States Supreme Court denied certiorari on April 17, 2000, this petition would still be late; counting the 240 days that had passed before the post-conviction petition was filed, Brost's time would have expired on or about August 20, 2000.[5] Brost's counsel filed this petition on April 16, 2001, apparently believing he had a year following the U.S. Supreme Court's denial of his petition for certiorari.

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233 F.3d 490, 491 (7th Cir. 2000). Other circuits have uniformly held it is not. *See Bunney v. Mitchell*, 241 F.3d 1151, 1156 (9th Cir. 2001); *Isham v. Randle*, 226 F.3d 691, 695 (6th Cir. 2000), *cert. denied*, 121 S.Ct. 1211 (2001); *Coates v. Byrd*, 211 F.3d 1225, 1227 (11th Cir. 2000), *cert. denied*, 121 S.Ct. 1298, 148 L.Ed.2d 995 (2001); *Ott v. Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), *cert. denied*, 529 U.S. 1099 (2000); *Rhine v. Boone*, 182 F.3d 1153, 1155 (10th Cir. 1999), *cert. denied*, 528 U.S. 1084 (2000). This court believes the Seventh Circuit would agree that seeking certiorari by the United Sates Supreme Court is not a form of "State . . . review."

[5] Brost filed a second post-conviction petition on September 19, 2000, that *was* deemed timely filed because based on a claim that the statute under which he was sentenced was unconstitutional. See Exhs. P. By then the federal limitations period had run under any computation.

APPRENDI CLAIM

Brost's counsel also throws in -- a kinder expression is unwarranted -- a claim under *Apprendi v. New Jersey*, ---- U.S. ----, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Apprendi* held that any fact other than a prior conviction that increases the penalty for a crime beyond the [p. 5] prescribed statutory maximum must be submitted to the jury and proved beyond a reasonable doubt. It appears Brost's argument is that under 730 ILCS 5/5-8-4(a) consecutive sentences for the three aggravated sexual assaults would have been mandated only if they had been found to have been "committed as part of a single course of conduct during which there was no substantial change in the nature of the criminal objective," and that the jury, rather than the sentencing judge, should have determined that these facts existed.

Different panels of the Illinois Appellate Court have disagreed on whether the holding of *Apprendi* reaches a determination that sentences shall be served consecutively where the individual sentences are not enhanced. *See People v. Lucas*, 2001 WL 286422 (Ill App. 1st Dist., March 21, 2001) (summarizing conflicting opinions). There is also disagreement as to whether *Apprendi* claims are cognizable on collateral review. *See People v. Jones*, 2001 WL 314750 (Ill. App. 1st Dist., March 30, 2001). These questions await resolution by the Illinois Supreme Court, and perhaps the United States Supreme Court, and will determine the ultimate fate of Brost's second post-conviction petition.

Nevertheless, in this court Brost's *Apprendi* claim is dead in the water. Not only could this court grant no relief because it has manifestly not been appealed to the highest Illinois court. 28 U.S.C. § 2254(b)(1); *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). It is also barred by the one-year limitations period of 28 U.S.C. § 2244(d). The statute provides that the limitations period for a habeas claim asserting a new constitutional right recognized by the Supreme Court begins to run on "the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." 28 U.S.C. § 2244(d)(1)(C). The Supreme Court has not declared *Apprendi* applicable to cases on collateral review. The Seventh Circuit has made clear that until it does, lower courts may not jump the gun and find that retroactivity is implied. *Talbott v. Indiana*, 226 F.3d 866 (7th Cir. 2000). Until then, Brost's *Apprendi* claim, like his other claims, is barred by 28 U.S.C. § 2244(d). The petition for writ of habeas corpus is accordingly dismissed.

[p. 6] This dismissal may not be appealed unless this court or the Court of Appeals issues a certificate of appealability. 28 U.S.C. § 2253(c)(1). If Brost seeks a certificate of appealability from this court, Brost should explain why "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to

deserve encouragement to proceed further.'" *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

IT IS SO ORDERED.

[signed] _____
Charles R. Norgle, Judge
United States District Court

DATED: 5-18-01

## APPENDIX C

Minute Order Form (06/97)

[inapplicable portions of front side of minute order form, omitted]

United States District Court,
Northern District of Illinois

Assigned Judge Charles R. Norgle
CASE NUMBER 01 C 2673 DATE 2/11/2002

CASE United States ex rel Brost
TITLE vs. Briley

DOCKET ENTRY: Before the court is Petitioner's motion to reconsider, or in the alternative, for a certificate of appealability [6-1,2]. For the reasons stated on the reverse side, both motions are denied. See reverse.

signed: Charles R. Norgle, Sr.

[Reverse side of Minute Order]

On January 4, 1995, Petitioner, Chester Brost, was convicted in the Circuit Court of Cook County on a charge of aggravated kidnaping, several counts of aggravate criminal sexual assault, and was sentenced to 105 years incarceration. Brost filed a direct appeal, and his conviction was affirmed on March 1, 1996.

Brost sought leave to appeal in the Illinois Supreme Court. On June 4, 1996, the Illinois Supreme Court denied Brost leave to appeal.

On January 8, 1997, Brost filed a post-conviction petition under Illinois law. But, under the applicable Illinois law, any post-conviction petition had to be filed by December 4, 1996, six months after the Illinois Supreme Court declined to hear his direct appeal. The Circuit Court of Cook County summarily dismissed Brost's post-conviction petition as untimely because the petition was late, and Brost failed to demonstrate a lack of culpable negligence. Brost unsuccessfully appealed the denial of his post-conviction petition. The record demonstrates that his appellate briefs were also untimely, and neither the Illinois Appellate Court nor the Illinois Supreme Court ruled on the merits of Brost's post-conviction petition.

On April 16, 2001, Brost filed a petition for writ of habeas corpus in this court alleging an Apprendi issue and a farrago of other unsupported claims. On May 18, 2001, the court dismissed Brost's habeas petition as untimely under 28 U.S.C. § 2244(d). On June 1, 2001, Brost filed the instant motion for reconsideration, or in the alternative, for a certificate of appealability.

As to the motion for reconsideration, Brost fails to cite the rule of civil procedure under which he is proceeding, but this type of motion must be under either Rule 59(e), or one of the subsections of 60(b). Liberally construing Brost's motion, the court will consider both Rules 59(e) and 60(b)(1).

Both Rules allow the court to reconsider

previous rulings, although the standards are more liberal under 59(e). That said however, relief under Rule 59(e) is rarely granted, and is justified only when there is "newly discovered evidence, an intervening change in the controlling law, [or] manifest error of law." A Rule 60(b)(1) motion should be granted only in exceptional circumstances, and only when there is a mistake, inadvertence, surprise or excusable neglect. Fed.R. Civ.P. 60(b)(1); see Lee v. Village of River Forest, 936 F.2d 976, 979 (7th Cir. 1991); Jones v. Lincoln Elec. Co., 188 F.3d 709, 732 (7th Cir. 1999); Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., 131 F.3d 625, 628 (7th Cir. 1997); United States v. 8136 Dobson Street, 125 F.3d 1076, 1082 (7th Cir. 1997). Neither Rule is appropriate to advance argument or theories that "could and should have been made before the district court rendered a judgment. . . or to present evidence that was available earlier." See e.g. LB Credit Corp. v. Resolution Trust Corp., 49 F.3d 1263, 1267 (7th Cir. 1995) (discussing Rule 59(e)). And application of both Rules is entrusted to the sound judgment of the district court. Matter of Prince, 85 F.3d 314, 324 (7th Cir. 1996); Lee, 936 F.2d at 979.

Brost points to no new facts, change in law, or manifest error of law. In a convoluted set of pleadings, Brost vigorously asserts that the door to the federal courthouse should always remain open to hear the type of claim he is raising. Congress, however, has determined otherwise, and imposed time limitations on § 2254 claims. As explained in the Court's May 18, 2001 opinion, Brost did not comply with those limits.

His habeas petition was properly dismissed as untimely, and he offers no evidence of cause and prejudice or a fundamental miscarriage of justice that would allow the court to hear the merits of his claims. See Brooks v. Walls, -- F.3d --, No. 01-1584, 2002 U.S. App. Lexis 1556 (7th Cir. Feb. 1, 2002) (analyzing the timeliness of a § 2254 petition when the Illinois Courts have found the post-conviction petition untimely).

Turning to Brost's request for a certificate of appealability, the court must either issue the certificate or state why the certificate should not issue. Fed. R. App. P. 22(b). "A certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The Supreme Court has recently re-iterated how an applicant meets this burden. See Slack v. McDaniel, 120 S.Ct. 1595, 1604 (2000). When a habeas application has been denied on its merits, the applicant "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Id. If the application was denied on procedural grounds, the applicant must cross two hurdles, one of which is directed to the district court's procedural holding, and the other directed to the underlying constitutional claims. See id. Thus, the applicant must demonstrate "that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id. And, the applicant must show, "at least, that jurists of reason would find it debatable whether the [habeas] petition states a valid claim of the denial of a constitutional

right. . . ." Id.

Here, Brost cannot make the requisite showing. First, his petition was denied as untimely, and he fails to demonstrate that reasonable jurists could [verb omitted] the timing issue. [sic.] See e.g. Brooks, 2002 U.S. App. Lexis 1556 (re-affirming that a state court's decision on the timeliness of a post-conviction petition is binding on a federal court, and that an untimely filed post-conviction petition does not toll the limitations period for filing a § 2254 petition). And, Brost offers nothing to demonstrate the merits of his claims. As noted in the court's May 18, 2001 opinion, the Apprendi issue is not a basis for relief. (R. 5, pp. 4-5.) Brost's other claims are an unwieldy farrago of assertions that are supported by neither facts nor law. Reasonable jurists cannot debate the lack of demonstrated merit to Brost's claims.

[end reverse side of Minute Order]

APPENDIX D

SIXTH DIVISION
March 01, 1996

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-95-0576

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

CHESTER BROST,
Defendant-Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
COOK COUNTY.

No. 93 CR 12680

HONORABLE
THOMAS A. HETT,
JUDGE PRESIDING.

ORDER

A jury found defendant Charles Brost guilty of three counts of aggravated criminal sexual assault, kidnapping, and robbery. The trial judge sentenced him to a term of 30 years for each of the three counts of aggravated criminal sexual assault and 15 years for aggravated kidnapping, these sentences to run consecutive to each other, and seven years for robbery with that sentence to be concurrent with the others. Defendant's sole contention on appeal is that he did not effectively waive his right to be present during his post-trial motion for a new trial and the aggravation and mitigation portion of his [p. 2] sentencing hearing.

Defendant contends that there is nothing in the record to indicate that defendant's waiver of his right to be present took place in open court. We do not agree, and we affirm his convictions. Because of the nature of the issue before us, it is unnecessary to set forth the facts of the crimes involved.

A criminal defendant has the constitutional right to be present in the courtroom at every stage of his trial, but where defendant voluntarily absents himself and chooses not to be present for proceedings he has waived his right to appeal. People v. Owens, 102 Ill.2d 145, 464 N.E.2d 252 (1984).

Following all the evidence and arguments, defendant chose not to be present when the verdict was returned. Before bringing the jury into court, the judge and defendant engaged in the following colloquy:

"Q. Your attorney indicates you do not wish to be present when the jury comes out and reaches its verdict?

A. Yes, sir.

Q. You have you have [sic] a right to be present, and in fact unless you voluntarily give up that right, you have to be here. Do you understand that?

A. Yes.

Q. What do you want to do?

[p. 3] A. Waive my right."

The jury then returned its verdicts. Defendant also chose not to be present at a pretrial motion to suppress identification. Defendant does not challenge the fact that he voluntarily waived being present at either of these two portions of the proceedings.

After trial, defendant presented a motion for new trial, which was denied, and a sentencing hearing was held. Defendant was not present for either of these hearings. Prior to these proceedings, the trial judge made the following statement in the presence of defense counsel:

"For purposes of the record, Mr. Court Reporter, when we didn't notice your absence earlier about 1:30, Mr. Chester Brost, the

> defendant in this case, came out into open court and indicated that he did not wish to be present during the hearing on his motion for a new trial. Nor did he want to be present during any portion of the hearing in aggravation.
>
> I questioned him and I am convinced that he is [sic] knowingly and intelligently waived his right to be present and that is a personal waiver on his part."

After the post-trial motion and the evidentiary part of the aggravation and mitigation hearing, defendant was present in open [p. 4] court. The judge then made the following statement: "At your request, you were not required to be present during the motion for new trial. That motion was denied. You were not required at your request, to be present at the evidentiary portion of the hearing in aggravation and mitigation." Neither defense counsel nor defendant objected to or challenged that statement by the judge. The trial judge then offered defendant an opportunity to speak, but defendant chose not to do so. Thereafter, the sentences were imposed.

We hold that defendant voluntarily waived his right to be present during the hearing on his motion for a new trial and during a portion of the hearing in aggravation and mitigation. That waiver is supported by evidence in the record. The trial judge made the initial statement that defendant had voluntarily and

intelligently waived his right to be present. Again before sentencing, in the presence of defense counsel and defendant, the judge again stated that it was at defendant's request that he was not present at those portions of the proceedings. No one challenged that assertion. It seems clear that defendant's right to be present was not presumed, but was a fact.

Accordingly, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

McNAMARA, J., with ZWICK, P.J. and EGAN, J., concur.

APPENDIX E

[p. A 1]

F I L E D
MAR 27 1997
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

STATE OF ILLINOIS )
) SS.
COUNTY OF COOK )

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT-CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF ILLINOIS
-vs-

Case No. 93-12680, etc.
Charge: Attempt Murder, etc.

CHESTER BROST

PETITION FOR POST-CONVICTION RELIEF

REPORT OF PROCEEDINGS of the hearing before the Honorable THOMAS A. HETT, on the 8th day of January, 1997.

Jamie R. Brown, CSR
Official Court Reporter
2650 South California Avenue
Chicago, Illinois 60608

[p. A 2]

INDEX

Date of Proceedings: January 8, 1997

Petition for Post-Conviction Relief

Pages A 1 to A 4

[p. A 3]

THE COURT: Chester Brost, on sheets one, two and three. Pro se motion to extend the time for filing a post-trial -- I mean a post-conviction case.

The defendant's pro se petition to total [sic.] requirements of 725 ILCS 5/122-1 is denied. There is no statute that allows the Court -- to allow the Court to total [sic.] requirements in this case.

The clerk shall notify the defendant of this ruling. And I'd ask you, Ms. Cour [sic.] Reporter, to type up the transcript of these remarks and file them with the clerk for inclusion in the file.

This case is off call.

(Which were all of the proceedings had in the above-entitled cause.)

[p. A 4]

STATE OF ILLINOIS

SS.

COUNTY OF C O O K

I, JAMIE F. BROWN, CSR, Official Court Reporter for the Circuit Court of Cook County, Illinois Judicial Circuit of Illinois, do hereby certify that I reported in shorthand the proceedings had on the hearing in the above-entitled cause; that I thereafter caused the foregoing to be transcribed, which I hereby certify to be a true and accurate transcript of the proceedings had before the Honorable THOMAS A. HETT, Judge of said court.

[signed] _____
Official Court Reporter

Dated this 2d day

of February, 1997.

APPENDIX F

F I L E D
APRIL 23 1997
AURELIA PUCINSKI
CLERK OF THE CIRCUIT COURT
CRIMINAL DIVISION

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

THE PEOPLE OF THE STATE
OF ILLINOIS,

Plaintiffs,

vs. 93 CR 12680

CHESTER BROST,

Defendant.

ORDER

This matter comes before the court on defendant's post-conviction petition pursuant to 725 ILCS 5/122-1 et seq. The defendant was tried by jury and ultimately found guilty of multiple counts of Aggravated Criminal Sexual Assault, Aggravated Kidnapping and Robbery. The court sentenced defendant to a total of 105 years in the Illinois Department of Corrections for his particularly heinous

crimes.

Initially, the court must determine whether the petition was timely filed. The post-conviction statute provides in pertinent part:

> "...No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal or the date for filing such a petition if none is filed or issuance of the opinion from the Illinois Supreme Court or 6 months after the date of the order denying certiorari by the United States Supreme Court or the date for filing such a petition if not is filed or 3 years from the date of conviction, whichever is sooner, unless the defendant alleges facts showing that the delay was not due to his culpable negligence."

Defendant's petition for leave to appeal was denied by the Illinois Supreme Court on June 5, 1996. Consequently, pursuant to statute, no post-conviction proceedings could be commenced after December 5, 1996. The defendant filed his petition on February 20, 1997. Unless the petitioner has alleged facts showing that the delay in filing was not due to his culpable negligence, the petition is statutorily barred and must be dismissed.

While the defendant has not alleged facts showing that the delay in filing was not due to his culpable negligence within the body of his post-conviction petition, he has attached an exhibit entitled "Motion to Toll Post-Conviction Limitation Statute and

for Appointment of Counsel." *Petition, Exhibit I.* The document is not file marked by the Circuit Clerk of Cook County. Nevertheless, according to court records, the motion was submitted on December 26, 1996 and denied by the trial court on January 8, 1997, as it is not cognizable under the Post-conviction Act. In his motion, the defendant alleges that he was not able to meet the deadline for filing his post-conviction (December 5, 1996 -- [p. 2] 6 months after his petition for leave to appeal was denied by the Illinois Supreme Court) because the prison facility is on indefinite lock-down status. Consequently, the defendant alleges in his motion that he has been "...locked within a cell for up to 24 hours a day and the full exercise of many of his rights have been encroached." *Petition, Exhibit I, p. 2, paragraph 7.* He goes on to allege that only a limited number of inmates are allowed to go to the law library each day for a limited amount of time, and that the inmates must take turns. He alleges that due to the lock-down he has not been able to obtain assistance from a law clerk or attorney. He alleges that due to the limited time to investigate and conduct research, he was not able to meet the statutory deadline for filing his post-conviction petition.

Although the court has already denied defendant's Motion to Toll the Post-Conviction Limitation Period for reasons stated above, it will consider the facts alleged therein as an attempt by petitioner to show that the delay in filing was not due to his culpable negligence as required by statute.

The court has contacted the Illinois Department of Corrections and has received the attached reply. [not included herein] The Department does provide for inmates' access to services and materials, even during periods of lock-down, and legal requests by inmates are prioritized by court deadlines. This refutes the facts alleged by petitioner in his attempt to show that the delay in filing was not due to his culpable negligence and his petition is hereby dismissed pursuant to statute.

DATE 4-23-97 THOMAS A. HETT
[signed]

APPENDIX G

FILED
AUG 08 1997
AURELIA PUCINSKI
CLERK OF CIRCUIT COURT

STATE OF ILLINOIS
SS.
COUNTY OF COOK

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE
STATE OF ILLINOIS

Case No. 93-12680

vs.

CHESTER BROST

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 11th day of June, 1997, this cause came on for hearing before the Honorable THOMAS HETT, Judge of said Court, upon the indictment herein, the defendant having entered a plea of not guilty.

Kenneth Madoch
Official Court Reporter
Circuit Court of Cook County
County Department-Criminal Division

[p. 2]

THE COURT: 93, 12680 Chester Brost, the defendant's pro se motion for reconsideration denied. Off call.

(Which were all of the proceedings had at the hearing of the above-entitled cause.)

STATE OF ILLINOIS

COUNTY OF C O O K

THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT - CRIMINAL DIVISION

I, Kenneth Madoch, Official Shorthand Reporter of the Circuit Court of Cook County, County Department-Criminal Division, do hereby certify that I reported in shorthand the proceedings had a the hearing in the above-entitled cause; and that I thereafter caused to be transcribe into typewriting and foregoing transcript, which I certify is a true and correct transcript of said proceedings.

[signed] _____
Official Shorthand Reporter
Circuit Court of Cook County.

Dated this 1st day of August, 1997.

APPENDIX H

---

IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
PLAINTIFF-APPELLEE,

vs.

CHESTER BROST,
DEFENDANT-APPELLANT.

Nos. 97-0733 Consolidated
97-2737

---

ORDER

This cause coming before the Court on the motion of the defendant-appellant, as Motion To Allow Private Counsel to Substitute as Counsel on Appeal, and File Supplemental Brief in 35 days; and the Court having been advised in the premises, and due notice having been given, IT IS HEREBY ORDERED:

The motion is allowed/~~denied~~.

DATED: _____

ORDER ENTERED
MAR 04, 1999
APPELLATE COURT
FIRST DISTRICT

[signed] Leslie Elaine South
JUSTICE

_____
JUSTICE

_____
JUSTICE

DENNIS DOHERTY
Attorney for Appellant
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
312/580-0935

APPENDIX I

FOURTH DIVISION
March 31, 1999

NOTICE
The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

1-97-0733 and 1-97-2737
Consolidated

---

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

CHESTER BROST,
Defendant-Appellant.

Appeal from the
Circuit Court of
Cook County.

No. 93 CR 12680

Honorable
Thomas A. Hett,
Judge Presiding

ORDER

Following a jury trial, defendant Chester Brost was convicted of robbery, aggravated kidnapping and three counts of aggravated criminal sexual assault. He was sentenced to a seven-year prison term for robbery to run concurrently with consecutive sentences of 15 years for aggravated kidnapping and 30 years for each count of aggravated criminal sexual assault. His convictions and sentences were affirmed on direct appeal. People v. Brost, No. 1-95-0576 (1966) (unpublished order under Supreme Court Rule 23). His petition for leave to appeal to the Illinois Supreme Court was denied on June 5, 1996. Defendant then filed a motion to toll the statute of limitations for filing a post-conviction petition, which the trial court denied on January 8, 1997. Subsequently, defendant filed a pro se post-conviction petition, which the trial court dismissed as untimely. He now [p. 2] appeals from the dismissal of that petition.

On February 20, 1997, defendant filed a pro se post-conviction petition alleging ineffective assistance of counsel and other constitutional violations. In dismissing defendant's petition, the trial court considered his motion to toll the statute of limitations, attached as an exhibit to the petition, as an attempt to show that his delay in filing was not due to his culpable negligence. The motion alleged that, due to prison lockdowns, he was confined to his cell 24 hours a day. The prison only allowed 11 inmates a day access to the law library, while the rest were put on a

waiting list. Defendant further alleged that the para-legals and law clerks were unable to provide adequate assistance, and without appointment of counsel he would be unable to adequately present his contentions of constitutional violations. After defendant's petition was dismissed, he filed a motion to reconsider, alleging that the Stateville Correctional Center was on lockdown from April 16, 1996 to October 23, 1996, during which time inmates did not have access to the law library. After October 23, defendant was allowed to go to the library once a month for a 45-minute period.

The Post-Conviction Hearing Act (725 ILCS 5/122-1 et seq. (West 1996)) provides:

> "No proceedings under this Article shall be commenced more than 6 months after the denial of a petition for leave to appeal * * * or 3 years from the date of [p. 3] conviction, whichever is sooner, unless the petitioner alleges facts showing that the delay was not due to his or her culpable negligence." 725 ILCS 5/122-1(c) (West 1996).

Here, defendant's petition for leave to appeal to the Illinois Supreme Court was denied on June 5, 1996, allowing defendant until December 5, 1996, to file his petition for post-conviction relief.

Defendant contends on appeal that the trial court improperly conducted an ex parte investigation, relying on a letter from the Department of regulations and policy regarding inmates' access to the library

during lockdown periods. We review de novo the sufficiency of the allegations in a post-conviction petition dismissed without an evidentiary hearing. People v. Coleman, 183 Ill.2d 366, 388-89 (1998). Therefore, we give no deference to the trial court's determination, but rely solely on the allegations contained in defendant's post-conviction petition.

Freedom from culpable negligence is difficult to establish and is also subject to de novo review. People v. Perry, 293 Ill. App. 3d 113, 115 (1997) "[I]n order to withstand dismissal at the first stage of post-conviction proceedings, a petition for post-conviction relief need only contain a simple statement which presents the gist of a claim for relief which is meritorious when considered in view of the record of the trial court proceedings." [p. 4] People v. Dredge, 148 Ill. App. 3d 911, 913 (1986). A pro se defendant need not construct legal arguments, but must allege sufficient facts in his post-conviction petition from which the trial court could find a valid claim of deprivation of a constitutional right. People v. Lemons, 242 Ill. App. 3d 941, 947 (1993). All well-pleaded facts in a petition are taken as true. People v. Coleman, 183 Ill. 2d 366, 381 (1998).

In Perry, the defendant alleged that prison lockdowns restricted his access to the law library and delayed his timely filing. The court found that the record showed periods of time in which the prison was not in lockdown, thus refuting defendant's contention that he had no access to the law library. Perry, 293 Ill. App. 3d at 117. Similarly, in this case defendant filed his post-conviction petition more than two months

after the December 5, 1996, deadline. In the affidavit attached to his motion to toll the statute of limitations, defendant admitted that despite the lockdown, he was allowed out of his cell if called for library privileges, visits, showers, and yard time. He stated in his motion to reconsider the denial of his post-conviction petition that the lockdown ended on October 23, 1996, more than one month before his petition was due. Although defendant also alleges in his brief on appeal that his trial transcripts were lost from June 15, 1996, until November 1, 1996, he still had more than a month to prepare his petition. Under these circumstances, defendant failed to demonstrate that his [p. 5] untimely filing was excused.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.

HALL, J., with HOFFMAN and WOLFSON, JJ. concurring.

APPENDIX J

IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

CHESTER BROST,
Defendant-Appellant.

Nos. 97-0733 ]
97-2737 ]
Consolidated

ORDER

This cause coming before the Court on the motion of the defendant-appellant, as Motion For Leave to File Supplemental Brief Instanter, and the Court having been advised in the premises, and due notice having been given,
IT IS HEREBY ORDERED:

The motion is ~~allowed~~/denied.

DATED: _____

[signed] Leslie Elaine South

_____
JUSTICE

ORDER ENTERED
APR 22, 1999
APPELLATE COURT
FIRST DISTRICT

JUSTICE

JUSTICE

DENNIS DOHERTY
Attorney for Appellant
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
312/580-0935

APPENDIX K

IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

CHESTER BROST,
Defendant-Appellant.

Nos. 97-0733 ]
97-2737 ] Consolidated

ORDER

This cause coming before the Court on the motion of the defendant-appellant, as Motion to Enlarge the Record, and the Court having been advised in the premises, and due notice having been given, IT IS HEREBY ORDERED:

The motion is ~~allowed~~/denied.

DATED: _____

[signed] Leslie Elaine South

_____
JUSTICE

ORDER ENTERED
APR 22, 1999
APPELLATE COURT
FIRST DISTRICT

JUSTICE

JUSTICE

DENNIS DOHERTY
Attorney for Appellant
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
312/580-0935

APPENDIX L

[May 6, 1999]

IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

CHESTER BROST,
Defendant-Appellant.

Nos. 97-0733 )
97-2737 )
Consolidated

ORDER

This cause coming before the Court on the motion of appellant, as "Motion for Reconsideration of the April 22, 1999 Order of Justice South Denying New Counsel Leave To File Appellant's Supplemental Brief Instanter, Same Having Been Mailed Five (5) Days After the First Due Date For the Filing of the Said Supplemental Brief," and the Court having been advised in the premises, and due notice having been given,

IT IS HEREBY ORDERED:

Upon reconsideration, the motion for leave to file the Supplemental Brief instanter is ~~allowed~~/denied.

Upon reconsideration, the motion to enlarge the record is ~~allowed~~/denied.

DATED: _____

[signed] Leslie E. South
JUSTICE

_____
JUSTICE

_____
JUSTICE

ORDER ENTERED
MAY 06, 1999
APPELLATE COURT
FIRST DISTRICT

DENNIS DOHERTY
Attorney for Appellant
601 S. LaSalle St.
Suite 700
Chicago, IL 60605
312/580-0935

APPENDIX M

[August 5, 1999]

IN THE APPELLATE COURT OF ILLINOIS,
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

CHESTER BROST,
Defendant-Appellant.

Nos. 97-0733 ]
97-2737 ]
Consolidated

ORDER

This cause coming before the Court on the motion of the defendant-appellant, as MOTION BY NEW COUNSEL REQUESTING LEAVE OF COURT TO FILE A SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT, WHERE THE INEFFECTIVE ASSISTANCE OF FORMER COUNSEL CAUSED SAME TO BE PRESENTED OUT-OF-TIME, and the Court having been advised in the premises, and due notice having been given, IT IS HEREBY ORDERED:

The motion is ~~allowed~~/denied.

DATED: _____

[signed] Warren D. Wolfson
JUSTICE

_____
JUSTICE

_____
JUSTICE

ORDER ENTERED
AUG 05, 1999
APPELLATE COURT
FIRST DISTRICT

DANIEL STOHR
Attorney for Appellant
150 North Wacker Drive
Suite 2020
Chicago, IL 60606
(312) 726-1180

APPENDIX N

[SEAL of the SUPREME COURT]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
CHICAGO 60601
(312) 783-1332

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
(312) 793-1333

June 18, 1999

Mr. Dennis Doherty
Attorney at Law
601 South LaSalle Street
Suite 700
Chicago, IL 60605

In re: Chester Brost, movant v. Justices of the First District Appellate Court, Fourth Division, et al., respondents.
No. 87561

Today the following order was entered in the captioned case:

Motion by movant for supervisory order or in the alternative, mandamus and/or prohibition.

Motion Denied.

Very truly yours,

[signed] Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Jim Ryan
Hon. Thomas E. Hoffman
Hon. Richard A. Devine
Hon. Warren D. Wolfson
Hon. Leslie E. South
Shelvin Louise Marie Hall

APPENDIX O

[SEAL of the SUPREME COURT]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
CLERK OF THE COURT
(217) 782-2035

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
(217) 524-8132

FIRST DISTRICT OFFICE
20TH FLOOR
160 NO. LASALLE ST.
CHICAGO 60601
(312) 783-1332

TELECOMMUNICATIONS
DEVICE FOR THE DEAF
(312) 793-1333

September 21, 1999

Mr. Daniel Stohr
Attorney at Law
150 North Wacker Drive
Suite 2020
Chicago, IL 60606
(312) 726-1180

In re: Chester Brost, movant v. Justices of the
First District Appellate Court,
Fourth Division, et al., respondents.
No. 88191

Today the following order was entered in the captioned case:

Second Motion by movant Requesting The Exercise of Supervisory Authority Pursuant to Supreme Court Rule 383. Motion Denied.

Very truly yours,

[signed] Juleann Hornyak
Clerk of the Supreme Court

cc: Hon. Jim Ryan
Hon. Thomas E. Hoffman
Hon. Richard A. Devine
Hon. Warren D. Wolfson
Hon. Leslie E. South
Shelvin Louise Marie Hall

APPENDIX P

SUPREME COURT OF ILLINOIS
88351 CLERK OF THE COURT
SUPREME COURT BUILDING
SPRINGFIELD, ILLINOIS 62701
(217) 782-2035

December 1, 1999

Mr. Dennis Doherty
Attorney at Law
601 South LaSalle Street
Suite 700
Chicago, IL 60605

No. 88351 - People State of Illinois, respondent, v. Chester Brost, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on December 23, 1999.

APPENDIX Q

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 17, 2000

Mr. Frederick F. Cohn
601 S. LaSalle Street
Suite 700
Chicago, IL 60605

Re: Chester Brost
v. Illinois, et al.
No. 99-1469

Dear Mr. Cohn:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

[signature]

William K. Suter, Clerk

## APPENDIX R

The Due Process Clause of the Fourteenth Amendment to the United States Constitution

U.S. Const., amend. XIV, Section 1:

> ". . . nor shall any State deprive any person of . . . liberty . . . without due process of law . . . ."

## APPENDIX S

## RAISING THE FEDERAL QUESTION

The federal question was raised throughout these proceedings, inasmuch as the Fourteenth Amendment entitles a prison inmate meaningful access to the courts, and that right has been violated throughout the proceedings below.